

Remarks

Claims 35-54 and 69 are pending in this application. No amendments are made to any of the claims.

Applicant acknowledges withdrawal of the previous rejections of claims under 35 U.S.C. §102(e) and §103(a). The only rejection still pending in this application is the provisional non-statutory double patenting rejection discussed below.

Information Disclosure Statement

Applicant thanks the Examiner for his consideration of the references submitted in Information Disclosure Statements filed October 6, 2004 (received by the USPTO on October 12, 2004) and November 29, 2004 (received December 2, 2004). Applicant notes, however, that signed copies of the accompanying 1449 Forms were not included with the Final Office Action mailed January 13, 2005. Copies of the signed 1449 Forms are respectfully requested.

Obviousness Type Double Patenting

Claims 35-54 and 69 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-10, 23-17, 28, 30, 32 34 and 36 of copending application No. 09/826,115 in view of Schmaljohn (2001). Applicant traverses and respectfully requests reconsideration and withdrawal of this rejection in light of the remarks below.

As a preliminary matter, Applicant notes that Schmaljohn (2001) was previously cited under 102(e) and 103(a) as allegedly anticipating and/or rendering obvious claims 35-54 and 69. As attested to in the declaration submitted October 6, 2004, the Schmaljohn reference is not available as a prior art reference because the subject matter of claims 35-54 and 69 was invented prior to November 20, 1997, the date upon which Schmaljohn became available as prior art. In light of the previously submitted declaration, the rejections under 102(e) and 103(a) were withdrawn.

Applicant is aware of no grounds for asserting a reference that is not available under § 102 or § 103 to make a rejection under the judicially created obviousness-type double patenting doctrine. Indeed, Applicant submits that Schmaljohn is not available as prior art in the context of an obviousness-type double patenting rejection, and to the extent that the disclosure of Schmaljohn is

relied upon in making the rejection, the rejection should be withdrawn.

To the extent that the Examiner believes that a double patenting rejection can be maintained in the absence of Schmaljohn, Applicant traverses. Claims 35-54 and 69 of the subject application are provisionally rejected over certain claims of copending application no. 09/826,115 (“the ‘115 application”).

US Patent Application 09/826,115 (“the ‘115 application”) is a continuation-in-part application filed on April 4, 2001, which claims priority to the subject application No. 09/701,536, a National Phase application, filed November 29, 2000 claiming priority to PCT/US/12298, filed June 3, 1999, that claims priority to Provisional Application No. 60/087,908, filed June 4, 1998. As of the present date, no claims of the ‘115 application have been found to be allowable.

According to the MPEP § 804B, “[i]f the ‘provisional’ double patenting rejection in one application is the only rejection remaining in that application, the examiner should then withdraw that rejection and permit the application to issue as a patent.” In accordance with MPEP § 804B, the provisional double patenting rejection of claims 35-54 and 69 over the ‘115 application should be withdrawn. Should claims in the ‘115 application be deemed to be obvious over claims issued from the subject application (that is, claims 35-54 and 69 of the subject application), an obviousness-type double patenting rejection of the claims in the ‘115 application over such issued claims for this case would be appropriate in that case. However, it is not proper to maintain a provisional obviousness-type double patenting rejection of claims 35-54 and 69, or to require a terminal disclaimer in the present circumstances, because claims 35-54 and 69 are now in condition for allowance, and the claims of the ‘115 application have not yet issued. Accordingly, the rejection must be withdrawn.

Conclusion

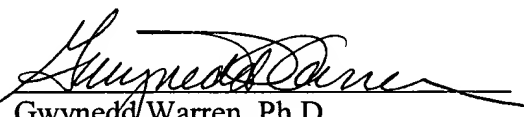
In light of the foregoing remarks, Applicant believes that claims 35-54 and 69 are in condition for allowance. A Notice of Allowance at an early date is respectfully requested.

In order to expedite consideration of this response, Applicant is faxing a courtesy copy of this document to the Examiner at (571) 273-0908, on the same day the response is filed.

Respectfully submitted,

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